No. 79-16

In the Supreme Court of the United States

OCTOBER TERM, 1978

MICHAEL A. CODUTO and RUDOLPH PERISICH,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

WILLIAM A. BARNETT
LAWRENCE E. MORRISSEY
CHARLES R. PURCELL
135 South LaSalle Street
Chicago, Illinois 60603
RA 6-4480
Attorneys for Petitioners

UNITED STATES LAW PRINTING CO., CHICAGO, ILLINOIS 60618 (312) 525-6581

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To: The Honorable, the Chief Justice of the United States and Associate Justices of the Supreme Court of the United States.

Petitioners, Michael A. Coduto and Rudolph Perisich, pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit, entered May 10, 1979, affirming a judgment of conviction against them entered by the United States District Court for the Northern District of Illinois, Eastern Division.

OPINION BELOW

The Court of Appeals did not file a formal opinion, but entered a per curiam order which will not be reported or published (Circuit Rule 35). The text of the order, dated May 10, 1979, is printed in full as Appendix A to this petition.

JURISDICTION

The judgment of the Court of Appeals (Appendix B) was entered May 10, 1979. Petitioners' timely petition for rehearing was denied June 5, 1979 (Appendix C). The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Whether, in a federal criminal case, the court must instruct the jury on the applicable period of limitations if the evidence provides a factual predicate for such instruction?

2. Whether the limitations instruction tendered by petitioners was sufficient to require the giving of an instruction on limitations?

STATUTES INVOLVED

18 U.S.C. § 1951:

> (a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.

18 U.S.C. § 3282:

> Except as otherwise expressly provided by law, no person shall be prosecuted, tried, or punished for any offense, not capital, unless the indictment is found or the information is instituted within five years next after such offense shall have been committed.

STATEMENT OF THE CASE

Petitioners have been convicted on a jury verdict of conspiring to commit extortion under color of office as elected officials of Countryside, Illinois, in violation of The Hobbs Act, 18 U.S.C. §1951. The Court of Appeals affirmed (App. A).

There was evidence to support a finding that petitioners had required Pletka and Associates, the developer of an industrial park in Countryside, to make unlawful cash payments to them in order to obtain building permits. There was evidence that this practice had continued up to April 12, 1972, when petitioner Perisich received the last payment and, on April 27, moved that the last permit involving a cash payment be issued by the city council. Petitioners offered evidence tending to show that no illegal activity regarding the April 12 permit had occurred (Tr. 2036-2039; 2129-2132; 2158-2159; 2161-2166), and they sought by cross-examination to discredit the testimony of the only government witness on this event (Tr. 1278-1288).

The applicable period of limitations is five years (18 U.S.C. §3282). The indictment was returned on April 11, 1977, four years, 364 days after the events of April 12, 1972. Petitioners tendered this instruction on limitations:

> The statutes of limitations for the offense charged in the indictment is five years. This means that you cannot find the defendants guilty unless you find be-

yond a reasonable doubt that a conspiracy continued or existed within the period beginning April 12, 1972 and ending April 27, 1972.

This does not mean, however, that you must exclude from consideration evidence of acts or conduct prior to April 12, 1972. A conspiracy may be a continuing thing which may be proved by a composite of acts. Therefore you may consider evidence of defendants' conduct prior to April 12, 1972, insofar as it may tend to prove a design or intent or pattern with respect to their conduct after April 12, 1972. Defendants' Instruction 52, App. A, p. 3.

The district judge refused the instruction, giving this reason for his action:

The Court: I will not give an instruction on statute of limitation cases. If there is a question of statute of limitations I will deal with it as a matter of law. The jury is not going to decide the application of the statute of limitations. You can ask the jury to find some fact on which the statute of limitations will turn but I will not let the jury decide the legal question whether the statute of limitations applies. Tr. (April 10, 1978) p. 89.

The district judge reaffirmed his position that no limitations instruction was required at the time he denied petitioners' post-trial motions:

The Court: On this point, concerning the statute of limitations, the Court has concluded that there was no error. No instruction was necessary in this case.

The cases that the defendants cite to me are all cases in which a period of limitation was part of the offense or part of the statute. In such a case, because that is an element of the offense, an instruction should be given to the jury, but there is no such element in this case.

I agree with the Government's position that there having been no such elements in the case, the Court did not instruct on the point and no such instructions were necessary and the instruction that was tendered by the defense I had to refuse because it is erroneous on its face. A review of the record in this case shows that the proof was made within the period of limitations. That is all that is necessary.

So the Court is going to rule that there was no error at all on which it has to go through this process of determining whether it was harmless.

Now I made that ruling during the the trial and I reviewed it very carefully. At first I was a little puzzled about what was being said, but then when I finally understood it, in view of the Government's response calling my attention to the facts of the case, I was able to conclude as I just stated. So that ground for a new trial is denied. Tr. (July 14, 1978) pp. 8-9.

REASONS FOR GRANTING THE WRIT

The decision below misconstrues the crime of conspiracy under the Hobbs Act and, as a result, prescribes an erroneous jury instruction on the issue of limitations in such cases.

The district judge declined to instruct the jury on limitations in the belief that the issue was one of law for the court. That position is patently incorrect, as the facts of the instant case show. The government offered proof that certain events occurred on April 12, 1972, and petitioners offered evidence to the contrary. If petitioners' evidence had been believed by the jury they would have been entitled to verdicts of not guilty, because the government would have failed to prove the existence of the conspiracy within the five-year period of limitations. Obviously, that factual issue was for the jury under proper instructions. *United States* v. *Alfonso-Perez,* 535 F.2d 1362 (2d Cir., 1976).

The court of appeals stated two reasons why the court's failure to instruct on the limitations issue was not reversible error. The first is that the error was harmless because petitioners did not contest the fact that petitioner Perisich had, on April 27, 1972, introduced an ordinance authorizing the issuance of a building permit in a case as to which an illegal payment had allegedly been made on April 12. Therefore, the court reasoned, there was undisputed proof of the commission of a conspiratorial act within the five-year period. This approach is erroneous because it ignores the fact that, if the payments had not been made as petitioners tried to show, the act of introducing the ordinance had been innocent, could not have been part of the conspiracy, and could not have affected the period of limitations.

The second rationale of the court of appeals is that petitioners waived the error by failing to tender a proper instruction on limitations. In this the court clearly erred, for the instruction tendered by petitioners is proper and should have been given.*

The court of appeals found the instruction tendered to be insufficient because it was not phrased in terms of the last "overt act." See Appendix A, p. 6, citing *United States* v. *Nowak,* 448 F.2d 134 (7th Cir., 1971). That form is correct in cases such as *Nowak,* which involve conspiracies charged under 18 U.S.C. § 371, because the commission of an overt act is an element of such conspiracies. In a Hobbs Act prosecution, however, the term "overt act" is inappropriate because the statute does not require pleading or proof of an overt act. *Ladner* v. *United States,* 168 F.2d 771, 773 (5th Cir., 1948), cert. den. 335 U.S. 827. That is why petitioners' tendered instruction No. 52 was drawn in terms of the existence and continuation of the conspiracy. There is no clearer language available to express the crucial idea, which is that the conspiracy must have been in existence at some time during the five years preceding the return of the indictment. Hence petitioners did preserve the point for review.

The question of when an instruction on limitations must be given, what form such instruction should take, and what defendants must do to make their record on this issue are fundamental and recurring, yet there are no relevant decisions of this Court to guide the lower courts. The instant case would be an appropriate vehicle for the Court to pro-

* The instruction contained the date, April 12, 1972, whereas April 11 would have been correct. Neither the district court nor the court of appeals relied upon this mistake as rendering the tendered instruction insufficient.

vide such guidance. It would be particularly useful for the Court to address the specific question of jury instructions on limitations in cases where the government is not required to plead or prove an overt act. Hobbs Act cases have become so numerous that the question is worthy of resolution by this Court.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment of the Court of Appeals for the Seventh Circuit.

Respectfully submitted,

WILLIAM A. BARNETT
LAWRENCE E. MORRISSEY
CHARLES R. PURCELL
Attorneys for Petitioners

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

Argued January 12, 1979

May 10, 1979

Before
Hon. Walter J. Cummings, Circuit Judge
Hon. Robert A. Sprecher, Circuit Judge
Hon. William G. East, District Judge*

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

Nos. 78-1934 & 78-1935 vs.

MICHAEL A. CODUTO and RUDOLPH PERISICH,
Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 77-CR-342

George N. Leighton, *Judge*

ORDER

Defendants Michael A. Coduto and Rudolph Perisich appeal their convictions of conspiracy to commit extortion while acting under color of official right in violation of 18 U.S.C. § 1951 (the Hobbs Act). We note jurisdiction pursuant to 28 U.S.C. § 1291 and affirm.

---

* Honorable William G. East, Senior United States District Judge for the District of Oregon, sitting by designation.

INDICTMENT:

On April 11, 1977, a one-count indictment was returned charging the defendants with conspiracy to commit extortion while acting under color of official right as elected officials of the City of Countryside. Trial to a jury began on March 21, 1978. On April 11, 1978, the jury returned a guilty verdict against both defendants. The Court sentenced the defendants to three years imprisonment and imposed fines of $10,000.00.

BACKGROUND FACTS:

Coduto was Mayor of the City of Countryside, Illinois from June, 1967 until trial, having previously served as an alderman.

Perisich was an alderman from 1963 until trial. As chairman of the building committee, Perisich regularly recommended approval or disapproval of building permits to the full city council.

Vaclav Pletka was the owner of Pletka and Associates, a general contracting business. George Houdek was his employee. Pletka and Associates built over 30 buildings in the Dansher Industrial Park, owned by Dansher Corporation, whose attorney was Edward Baker.

The testimony at trial established that during the period of June, 1966 to April 12, 1972, Coduto and Perisich required Pletka and Associates to make cash payoffs of one percent of construction, totaling approximately $70,000, in order to obtain building permits. Additional payoffs were made to obtain City Council approval for lot lines and set-backs in one area of the park and for Perisich to arrange an early foundation permit for one building.

ISSUES ON APPEAL:

1. Whether the Court erred in refusing to instruct the jury on the statute of limitations.

2. Whether the Court erred in permitting a witness to testify to the out-of-court declarations of a deceased person.

3. Whether certain diaries and calendars of the principal Government witness were properly admitted in evidence as business records.

4. Whether the Court improperly implied to the jury that the defendants had a duty to produce witnesses.

DISCUSSION:

1. *Statute of Limitations.*

After extensive pre-instruction discussion, the District Court refused to give the jury the proposed defense Instruction No. 52 on the statute of limitations, which read as follows:

> "The statutes [*sic*] of limitations for the offense charged in the indictment is five years. This means that you cannot find the defendants guilty unless you find beyond a reasonable doubt that a conspiracy continued or existed within the period beginning April 12, 1972 and ending April 27, 1972.
>
> "This does not mean, however, that you must exclude from consideration evidence of acts or conduct prior to April 12, 1972. A conspiracy may be a continuing thing which may be proved by a composite of acts. Therefore you may consider evidence of defendants' conduct prior to April 12, 1972, insofar as it may tend to prove a design or intent or pattern with respect to their conduct after April 12, 1972."

The indictment issued on April 11, 1977 alleged the final acts of the alleged conspiracy occurred on April 11, 12, and 27, 1972. 18 U.S.C. § 3282 bars prosecution "unless the indictment is found . . . within five years next after such offense shall have been committed." The indictment charged that the conspiracy was in existence from June, 1966 to April 27, 1972. The defendants note, however, that the jury could have disbelieved the evidence of the events on or after April 11, but believed that defendants were guilty of a conspiracy that had terminated before April 11. *See United States* v. *Alfonso-Perez,* 535 F.2d 1362, 1364 (2d Cir. 1976).[1] In such a case, defendants would have been prejudiced by a refusal to instruct on the statute of limitations.

"The defendant in a criminal case is entitled to have the jury consider any theory of defense which is supported by law and which has some foundation in the evidence, however tenuous." *United States* v. *Bessesen,* 445 F.2d 463, 467 (7th Cir.), *cert. denied,* 404 U.S. 984 (1971). We, therefore, reject the Government's argument that because the defense was based on denial of the events charged rather than a claim that they occurred before April 11, 1972, the defendants were not entitled to an instruction on the statute of limitations. It is true that an instruction should not be given on a theory that is not supported by the evidence. *United States* v. *Nickels,* 502 F.2d 1173, 1178 (7th Cir. 1974), *cert. denied,* 426 U.S. 911 (1976). The defendants should not be required, however, to admit guilt in order to avail themselves of the defense that the prosecution is

[1] In *Alfonso-Perez,* only one act of an alleged conspiracy could have occurred beyond the statutory period. The Court found error in failing to instruct on the statute of limitations because it was possible, though unlikely, that the jury believed that the excludable offense was the only one that actually occurred.

time-barred. A valid defense is that the offense did not occur, but even if it did, it was completed more than five years before the defendants were indicted.

One of the acts which allegedly furthered the conspiracy, however, was Perisich's motion before the city council on April 12, 1972 to grant a building permit. Neither defendant denies that this act occurred.[2] Thus, even if the jury was not convinced that Pletka and Perisich discussed the payoff on April 11 or that the payoff occurred on April 12, it could still have believed that Perisich's obtaining approval of the permit was in furtherance of the conspiracy.[3]

Defendants claim that they are entitled to an instruction on the statute of limitations because "[a] defendant in a criminal trial is always entitled to have the jury instructed on his theory of defense if it is properly presented and has some basis in the evidence presented." *United States* v. *Bastone,* 526 F.2d 971, 987 (7th Cir. 1975). Defense Instruction No. 52 was refused, however, because the Court found the instruction confusing and misleading and because it considered the applicability of the statute of limitations to be a legal, not a factual, issue.

Defendants admit that their instruction contained the wrong date, but argue that this error was insufficient reason to reject the instruction since it was so easy to correct.

[2] The existence of this undisputed act distinguishes this case from *Alfonso-Perez.* In addition, the Court in that case admitted that, considering "the unlikelihood that the jury found the facts in such a way as to create a statute of limitations defense," it would have been reluctant to reverse if the refusal to give the statute of limitations instruction were the only error.

[3] Of course, Coduto cannot escape guilt merely because all acts within the limitations period were performed by Perisich. *Pinkerton* v. *United States,* 328 U.S. 640 (1946); *United States* v. *Nowak,* 448 F.2d 134, 139 (7th Cir. 1971).

The instruction was also confusing in directing the jury to find the defendants not guilty unless it finds "beyond a reasonable doubt that a conspiracy continued or existed within the period beginning April 12, 1972 and ending April 27, 1972." In discussing the instruction, the Court correctly stated the rule that "the period of limitations in a conspiracy begins to run from the last act committed in furtherance of the conspiracy." "As long as any of the conspirators engaged in overt acts in furtherance of this scheme, the conspiracy continued." *Nowak,* 448 F.2d at 139.

In addition, the Court said that it would decide as a matter of law whether the prosecution was barred. It was willing, however, to ask the jury to find the facts on which applicability of the statute of limitations would depend. The defense did not proffer any modified instruction.

United States v. *Spock,* 416 F.2d 165, 181-82 (1st Cir. 1969), held that submission to the jury of special interrogatories in a criminal case violates the right to a jury trial. The defense was justified, therefore, in disregarding the Court's suggestion that a special interrogatory be used to determine when the conspiracy ended. Nevertheless, the defense could have drafted an instruction that informed the jury of what facts they must find without requiring them to rule on the legal question of whether the statute of limitations had run. This Court, in *Nowak,* 448 F.2d at 140, approved the District Court's instruction on the statute of limitations in a conspiracy case. The instruction in that case stated that the Government must prove that one or more overt acts occurred after a particular date. We assume that had such an instruction been requested in the present case, it would have been given.

In *United States* v. *Bessesen,* the District Court rejected two jury instructions tendered by the defense. On appeal, this Court stated:

> "The defense did not attempt to alter the form of the instruction or to submit alternative instructions. The primary responsibility rests with counsel to make fair and proper requests to charge. [Citations omitted]. The defendant in a criminal case will not ordinarily be heard to complain of the trial court's failure to set out in its charge his specific theory or theories of defense, unless he has himself formulated them into proper tendered instructions." 445 F.2d at 468.

Nevertheless, "where the failure to instruct 'constitutes basic and highly prejudicial error,' reversible error exists regardless of the defendant's failure to have requested the instruction." *United States* v. *Esquer,* 459 F.2d 431, 435 (7th Cir. 1972), *cert. denied,* 414 U.S. 1006 (1973). The Supreme Court has recognized that, absent a request, reversal is required only when "the failure of the trial court to give such an instruction *sua sponte* was plain error or a defect affecting substantial rights." *United States* v. *Park,* 421 U.S. 658, 676 (1975).

In light of the abundance of relevant evidence presented by the Government showing overt acts within the limitations period and of defendants' refusal to modify their instruction despite the District Court's willingness to give a properly worded charge involving only a factual question, we do not believe that the failure of the Court to give an instruction on the statute of limitations was so "highly prejudicial" as to constitute plain error.

2. *Hearsay.*

Over defendants' objection, witness Pletka testified concerning a conversation with Ed Baker, who died before trial, in which Baker explained the deal whereby Pletka would have to make payments to defendants in order to get his building permits. The District Court ruled that Baker's statements were not hearsay because they were

not offered to prove their truth, but only to explain Pletka's conduct and why he testified that he "knew the score." During this testimony, the Court instructed the jury as follows:

> "Now let me stop here and say something to the jury. This is to explain why this witness said that he knew the score.
>
> "Now this isn't to be taken as true what Mr. Baker said. This is simply why he said he knew the score and that's how the evidence is taken.
>
> "That is the Court's ruling. You can listen to it providing the jury understands that it's merely to answer why he said he knew the score. He said he knew the score because he talked to Mr. Baker. Now Mr. Baker might have been telling him the truth, Mr. Baker might not have been, that question is for you to decide from all of the evidence."

In the Court's general charge to the jury, it said:

> "During the course of the trial, Government witnesses were allowed to relate conversations they had with other persons outside of Court. The person with whom the conversation was had was not under oath at the time and is not subject to cross examination by the defendants.
>
> "These conversations were not offered to prove that what the person said was true and you should not consider them for that purpose. These conversations were offered merely to show why something was done or why two persons happened to meet. You cannot find that what the third person, not here in court, not under oath, and not subject to cross examination is stated to have said is true, merely because someone present in Court relates such a conversation with such a third person."

We agree with the District Court that the statements were not hearsay, and we believe the Court's instructions vitiate any complaint that the jury may have considered

Baker's statements as evidence of the offense. Because we accept the Court's rationale, we need not reach the Government's arguments that the conversation was admissible as evidence of Pletka's state of mind, and that it was an adoption under Federal Rules of Evidence 801(d)(2)(B) and, therefore, admissible as substantive evidence of the offense.[4] Even if admission of the conversation was error, it was certainly harmless in light of the overwhelming evidence against defendants.

3. *Business Records.*

The Government offered into evidence the daily diaries in which Pletka recorded his business activities from 1966 to 1972. These records were crucial evidence of the specific payments made since Pletka had no independent memory of several of the transactions and his memory was not refreshed by viewing the diaries. As foundation for admission of the diaries, Pletka testified that in 1966, he used a calendar form of diary in which he wrote down almost all the activities he had to do each day. In 1967 and 1968, Pletka used a steno pad, in which he recorded what he had to do and crossed out each entry as it was completed. In 1968-1972, Pletka returned to calendar diaries. He testified that he kept the diaries as a record of his activities in the contracting business. The diaries were admitted under the Rule 803(6) hearsay exception for business records.

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[4] At oral argument, the Government changed its tack and relied primarily on the adoption theory. Counsel stated that although the Government denied that Baker's statements were hearsay when admission was sought, it later argued the truth of those statements to the jury. Nevertheless, when the Government offered the testimony and represented it as non-hearsay, the Court made the correct ruling. Any subsequent misconduct by the Government does not render the testimony retroactively inadmissible. We do not commend Government counsel for this tack; yet we cannot say the rhetoric denied the defendants a fair trial.

In *United States* v. *Hickey,* 360 F.2d 127 (7th Cir. 1966), this Court upheld the admissibility of an accountant's notes under the business records statute (28 U.S.C. § 1732), although the witness had no independent recollection of the facts and the notes did not refresh his recollection. The Court stated: "This section was designed to permit the admission of business memoranda which impart a circumstantial guarantee of trustworthiness. The test is one of reliability." 360 F.2d at 143. In *United States* v. *Bohle,* 445 F.2d 54, 61 (7th Cir. 1971), we cited *Hickey* and added that "the trial judge must be left some discretion to decide whether" the sources of information from which the records were made and the circumstances of their preparation indicate trustworthiness.

We agree with the District Court that Pletka's testimony was sufficient foundation for admission of the diaries. His testimony established that the diaries were regularly kept in the course of Pletka's business—that they were circumstantially trustworthy. We reject defendants' arguments that the records were mere private diaries and that they were untrustworthy because only Pletka prepared and used them and because they indicated future, rather than past, activities. We are satisfied that Pletka's records were "typical of entries made systematically or as a matter of routine to record events or occurrences, to reflect transactions with others, or to provide internal controls." *Palmer* v. *Hoffman,* 318 U.S. 109, 113 (1943).

4. *Duty to Produce Witnesses.*

During recross-examination of Pletka, the Court sustained a Government objection because the testimony was outside the scope of the redirect examination. The Court added: "If you want to call this witness later on in defense and ask these questions, you may do that." Defense counsel objected, in the presence of the jury, that the Court had

"indicated that the defendants must do something by calling this witness." The Court repeated that the defense knew how to make a Government witness a defense witness. Defendants moved for a mistrial, and the motion was denied. As Pletka was leaving the witness stand, he asked the Court if he would be called again. The Court answered that if the defendants served him with a subpoena, he would have to respond.

Defendants claim these remarks implied that the defendants were under a duty to call a witness. Disregarding that the defendants raised the matter themselves in the presence of the jury that the jury was properly instructed as to the duty and burden of the defense, the implication suggested by defendants simply cannot reasonably be read into the Court's statements. We see neither prejudice nor other justification for a new trial.

The District Court's judgments of conviction entered on July 14, 1978 are affirmed.

AFFIRMED.

APPENDIX B

Unpublished Per Curiam Order

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604
May 10, 1979
Before
Hon. Walter J. Cummings, Circuit Judge
Hon. Robert A. Sprecher, Circuit Judge
Hon. William G. East, District Judge*

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

Nos. 78-1934, 78-1935 vs.

MICHAEL A. CODUTO and RUDOLPH PERISICH,
Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 77-Cr-342

George N. Leighton, Judge

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED, in accordance with the order of this court entered this date.

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* Honorable William G. East, Senior United States District Judge for the District of Oregon, sitting by designation.

APPENDIX C

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604
June 5, 1979.

Before

Hon. Walter J. Cummings, Circuit Judge
Hon. Robert A. Sprecher, Circuit Judge
Hon. William G. East, District Judge*

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

Nos. 78-1934, 78-1935 vs.

MICHAEL A. CODUTO and RUDOLPH PERISICH,
Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 77-CR-342

George N. Leighton, Judge.

ORDER

On consideration of the petition for rehearing filed in the above-entitled causes by defendants-appellants, Michael Coduto and Rudolph Perisich, all of the judges on the original panel having voted to deny the same,

IT IS HEREBY ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

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* The Honorable William G. East, Senior United States District Judge for the District of Oregon, is sitting by designation.